

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

and

SIERRA CLUB,

Intervenor-Plaintiff,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven
Whalen

**DEFENDANTS' RESPONSE TO THE GOVERNMENT'S
MOTION FOR TIME TO FILE MOTION FOR PARTIAL
FINAL JUDGMENT AND SIERRA CLUB'S MOTION FOR
CERTIFICATION OF PARTIAL FINAL JUDGMENT**

Defendants DTE Energy Company and Detroit Edison Company (collectively, DTE) do not oppose either the Government's motion for time to consider whether to seek certification of this Court's March 3, 2014 Order pursuant to Rule 54(b) or Sierra Club's motion for certification of partial final judgment. Defendants also agree with the Government's suggestion that a telephonic status conference would be useful to allow the Court and the parties to consider how the case should proceed.

As Sierra Club has explained in the brief supporting its motion, there is no just reason to delay appellate review of this Court's March 3 Order. The claims involving

the 2010 projects at Monroe Unit 2 are distinct from the claims that the Government has added through its Amended Complaint¹; the need for appellate review of the March 3 Order will not be impacted by subsequent adjudication of those claims; and Rule 54(b) certification will preserve judicial and party resources by allowing the Sixth Circuit to address now the Government's and Sierra Club's contentions regarding the legal standards that will govern any newly-added claims.

Defendants also respectfully submit that a telephonic status conference to allow the Court and the parties to address how the case should proceed from here would be useful. As the Government notes in its motion, a stay pending any interlocutory appeal is one proposal the Court should consider at such a conference. This Court's March 3 Order establishes the legal standard that will govern NSR claims like those that the Government has added. It thus defines the permissible scope of discovery and creates the legal framework for resolution of any new claims. In the absence of a stay of further proceedings, any modification of that standard by the Sixth Circuit could result in substantial duplication of effort by the Court and the parties. Such a result is unlikely in Defendants' estimation, but the number of claims

¹ The Court granted the Government's and Sierra Club's motions for leave to file amended complaints on April 9, 2014, on the ground that Defendants "consent to the filing of the amended complaints." ECF No. 202. Defendants did not oppose the Government's motion for leave to file an amended complaint, provided that the Government's claims involving the Spring 2010 Monroe 2 projects were adjudicated before any new claims. ECF No. 187. That condition has been satisfied by the Court's March 3 Order.

But DTE did, in fact, oppose Sierra Club's motion for leave to file an amended complaint to the extent it sought to expand the scope of the case by adding a claim in addition to the claims the Government seeks to add. *See* ECF No. 189.

the Government has added through its Amended Complaint counsels in favor of achieving clarity on the governing legal standard before those new claims are litigated.

Respectfully submitted this 11th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2014, the foregoing **DEFENDANTS' RESPONSE TO THE GOVERNMENT'S MOTION FOR TIME TO FILE MOTION FOR PARTIAL FINAL JUDGMENT AND SIERRA CLUB'S MOTION FOR CERTIFICATION OF PARTIAL FINAL JUDGMENT** was served electronically only on counsel of record through the Court's CM/ECF System.

/s/ George P. Sibley, III